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Public Prosecutor v Cheok Chuan Huei

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HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO WA-45A-23–08 OF 2019
ASLAM ZAINUDDIN JC
25 OCTOBER 2021

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Criminal Law — Dangerous Drugs Act 1952 — Section 39B — Trafficking dangerous drugs — Drugs found at house rented by accused (premises) — Accused lead police to safe box where drugs were kept — Whether other persons had access to premises — Whether elements of offence established — Whether prosecution proved case against accused beyond reasonable — Whether there was a serious gap in prosecution case — Whether defence bare denial and an afterthought

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Acting on information received, the raiding officer, PW7 led a party of police personnel to the crime scene ('premises'). When the team reached the said premises, PW7 found the grill was locked. As there were no response forthcoming from knocking the door, PW7 instructed his team to cut and break the padlock of the grill and subsequently, opened the main door which was unlocked. As PW7 and his team entered the said premises, they saw the accused was standing in front of the master bedroom. The accused then brought PW7 and his team to the main room to one safe deposit box which was locked from the dressing cabinet. The accused opened the padlock using a key which was placed on top of the safe deposit box and handed over to PW7 14 transparent plastic packets suspected to contain illegal drugs id est methamphetamine. Consequently, the accused was arrested. PW1, the chemist confirmed upon analysis that the packets contained 612.8g of methamphetamine. The accused was then charged for an offence under s 39B of the Dangerous Drugs Act 1952 ('the Act'). The main contention of the accused in his defence were that there were other individuals who had access to the said premises other than the accused himself. When the police party raided the premises, at the first instance, the accused made known to PW7 that the drugs found belonged to one Ah Chong and were not his.

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Held, convicting and sentencing accused to death:

(1) In order for the prosecution to make out a prima facie case on the trafficking charge against the accused, the prosecution must that: (a) the drugs involved was a dangerous drug as specified in the First Schedule of the Dangerous Drugs Act 1952; (b) the drugs were in the possession of the accused; and (c) the accused was trafficking the said drugs. In respect of the identity and weight of the impugned drugs, PW1, the chemist,

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confirmed that the impugned drugs contained 612.8g of methamphetamine. It was also stated in the Act that methamphetamine is a dangerous drug listed in Part III of the First Schedule to the said Act. Further, the chain of custody in handling the impugned drugs were intact from the day PW7 seized the drugs, and also when the drugs were analysed by the chemist as it was the same drugs that was recovered in this instant case until its production before this court. Therefore, the first element of the offence had been proven by the prosecution on a maximum evaluation (see paras 18–19 & 21).

(2) The accused had possession of the said premises as a tenant as he was the signatory of the tenancy agreement. The police team was forced to cut the padlock of the grill in order to enter the premises. Upon entering, PW7 saw the accused was standing in the living room alone and there were no other individuals present at that material time. The impugned drugs were found in the room led by the accused and the safe deposit box was opened by the accused using a key, placed on top of the safe deposit box. Therefore, the accused indeed had access to the room and therefore had possession over the impugned drugs (see para 31).

(3) The defence's contention that the premises were accessible to other persons was not agreed by the court. The fingerprint padlock could only be unlocked with a specific thumbprint id est that of the accused who was the occupant of the said premises. It can be inferred that the accused had exclusive access over the said house and consequently had possession of the impugned drugs. Furthermore, there were DNA of the accused at the premises. On that account, the accused certainly was the occupant of the said premises and was the only individual occupying the premises. Accordingly, the prosecution had successfully proven that the accused had possession of the impugned drugs. The second element of the offence had also been proven by the prosecution (see paras 32–33).

(4) An inference could be drawn that the accused had knowledge of the impugned drugs which were found in the said premises at the time the raid was conducted by the police party. The amount of drugs involved was well in excess of 50g, thus triggering the statutory presumption of trafficking as provided in s 37(da) of the Act. The third element of the offence had been proven by the prosecution (see para 36).

(5) The accused failed to provide detailed particulars of one Ah Chong to further investigate on that particular matter. Furthermore, the absence of forensic evidence like finger prints of the accused was irrelevant and should not be questioned in the instant case where the impugned drugs were found bearing in mind that the accused was the occupant of the said house, and that being so he had possession and knowledge. Therefore, the

prosecution had adduced credible evidence to successfully prove a prima facie case against the accused for the preferred charge against him (see paras 39–41).

(6) The defence of the accused was an afterthought and constituted a bare denial. The court rejected the version illustrated by the accused that the impugned drugs were not his and that it belonged to one Ah Chong instead. It was illogical for Ah Chong to keep the drugs in the accused person's house. The house was rented by the accused pursuant to the tenancy agreement, hence it was not probable for Ah Chong to put his things without first asking permission from the accused. Indeed, the accused had the 'power of disposal' over the impugned drugs and had the 'power to exclude other persons from enjoyment' of the said drugs. Therefore, the allegation that the said drugs was Ah Chong's was unsustainable (see paras 48 & 50).

(7) The prosecution had successfully proved its case beyond reasonable doubt against the accused. The accused had failed to raise a reasonable doubt in the prosecution's case and had failed to rebut the presumption of trafficking stated in s 37(da) of the Act on a balance of probabilities. The accused was found guilty and convicted as per the charge preferred. Accordingly, the accused was sentenced to death, id est to be hanged by the neck till he was dead, pursuant to s 277 of the Criminal Procedure Code (see para 61).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima, pegawai serbuan, PW7 mengetuai sekumpulan anggota polis ke tempat kejadian ('premis tersebut'). Apabila pasukan tiba di premis tersebut, PW7 mendapati jeriji telah berkunci. Memandangkan tiada sebarang maklum balas apabila pintu diketuk, PW7 mengarahkan pasukannya memotong dan memecahkan kunci jeriji dan seterusnya membuka pintu utama yang tidak berkunci. Ketika PW7 dan pasukannya memasuki premis tersebut, mereka melihat tertuduh berdiri di hadapan bilik tidur utama. Tertuduh kemudiannya membawa PW7 dan pasukannya ke bilik utama ke satu peti simpanan yang dikunci dari kabinet persalinan. Tertuduh membuka kunci menggunakan kunci yang diletakkan di atas peti simpanan dan menyerahkan kepada PW7 14 paket plastik lutsinar yang disyaki mengandungi dadah terlarang iaitu methamphetamine. Akibatnya, tertuduh telah ditangkap. PW1, ahli kimia mengesahkan melalui analisis bahawa paket tersebut mengandungi 612.8g methamphetamine. Tertuduh kemudiannya didakwa atas kesalahan di bawah s 39B Akta Dadah Berbahaya 1952 ('Akta tersebut'). Pertikaian utama tertuduh dalam pembelaannya ialah terdapat individu lain yang mempunyai akses ke premis tersebut selain daripada tertuduh sendiri. Apabila pihak polis menyerbu premis tersebut, pada asalnya, tertuduh memaklumkan kepada PW7 bahawa dadah yang ditemui adalah milik seorang Ah Chong dan bukanlah miliknya.

Diputuskan, mensabitkan dan menjatuhkan hukuman mati kepada tertuduh:

(1) Bagi pihak pendakwaan membuktikan kes prima facie atas pertuduhan pengedaran terhadap tertuduh, pihak pendakwaan mestilah: (a) dadah yang terlibat adalah dadah berbahaya seperti yang dinyatakan dalam Jadual Pertama Akta Dadah Berbahaya 1952; (b) dadah tersebut berada dalam milikan tertuduh; dan (c) tertuduh mengedar dadah tersebut. Berkenaan dengan identiti dan berat dadah yang dipersoal, PW1, ahli kimia, telah mengesahkan bahawa dadah yang dipersoal tersebut mengandungi 612.8g methamphetamine. Ia juga dinyatakan dalam Akta bahawa methamphetamine adalah dadah berbahaya yang disenaraikan dalam Bahagian III Jadual Pertama Akta tersebut. Selanjutnya, rantaian jagaan dalam pengendalian dadah yang dipersoal adalah kukuh dari hari PW7 merampas dadah tersebut, dan juga apabila dadah tersebut dianalisis oleh ahli kimia kerana ia adalah dadah yang sama yang ditemui dalam kes semasa ini sehingga pengemukaannya di hadapan mahkamah ini. Oleh itu, elemen pertama kesalahan telah dibuktikan oleh pihak pendakwaan berdasarkan penilaian maksimum (lihat perenggan 18–19 & 21).

(2) Tertuduh mempunyai milikan terdapat premis tersebut sebagai penyewa kerana beliau adalah penandatangan perjanjian sewaan. Pasukan polis terpaksa memotong kunci jeriji untuk memasuki premis berkenaan. Sebaik masuk, PW7 melihat tertuduh sedang berdiri di ruang tamu seorang diri dan tiada individu lain ada ketika itu. Dadah yang dipersoal ditemui di dalam bilik dibawa oleh tertuduh dan peti simpanan tersebut dibuka tertuduh menggunakan kunci, diletakkan di atas peti simpanan tersebut. Oleh itu, tertuduh sememangnya mempunyai akses ke bilik dan oleh itu mempunyai milikan ke atas dadah yang dipersoal (lihat perenggan 31).

(3) Pendapat pihak pembelaan bahawa premis tersebut boleh diakses oleh orang lain tidak dipersetujui oleh mahkamah. Kunci mangga cap jari hanya boleh dibuka dengan cap ibu jari khusus iaitu milik tertuduh yang merupakan penghuni premis tersebut. Ia dapat disimpulkan bahawa tertuduh mempunyai akses eksklusif ke atas rumah tersebut dan akibatnya mempunyai milikan dadah yang dipersoal. Tambahan pula, terdapat DNA tertuduh di premis tersebut. Atas sebab itu, tertuduh pastinya merupakan penghuni premis tersebut dan merupakan satu-satunya individu merupakan penghuni premis tersebut. Justeru, pihak pendakwaan berjaya membuktikan tertuduh mempunyai milikan dadah yang dipersoal. Elemen kedua kesalahan tersebut juga telah dibuktikan oleh pihak pendakwaan (lihat perenggan 32–33).

(4) Kesimpulan boleh dibuat bahawa tertuduh mempunyai pengetahuan tentang dadah yang dipersoal yang ditemui di premis tersebut semasa serbuan dijalankan oleh pihak polis. Jumlah dadah yang terlibat adalah

melebihi 50g, sekali gus membangkitkan anggapan statutori pengedaran seperti yang diperuntukkan dalam s 37(da) Akta tersebut. Elemen ketiga kesalahan telah dibuktikan oleh pihak pendakwaan (lihat perenggan 36).

(5) Tertuduh gagal memberikan butiran terperinci tentang seorang Ah Chong untuk siasatan lebih lanjut mengenai perkara tersebut. Tambahan pula, ketiadaan keterangan forensik seperti cap jari tertuduh adalah tidak relevan dan tidak seharusnya dipersoalkan dalam kes semasa di mana dadah yang dipersoal ditemui dengan mengambil kira bahawa tertuduh adalah penghuni rumah tersebut, dan oleh itu beliau mempunyai milikan dan pengetahuan. Oleh itu, pihak pendakwaan telah mengemukakan keterangan yang boleh dipercayai untuk berjaya membuktikan kes prima facie terhadap tertuduh bagi pertuduhan pilihan terhadapnya (lihat perenggan 39–41).

(6) Pembelaan tertuduh adalah pemikiran semula dan merupakan penafian kosong. Mahkamah menolak versi yang digambarkan oleh tertuduh bahawa dadah yang dipersoal tersebut bukan miliknya dan sebaliknya ia milik seorang Ah Chong. Adalah tidak logik untuk Ah Chong menyimpan dadah di rumah tertuduh. Rumah tersebut disewa tertuduh mengikut perjanjian sewaan, oleh itu adalah tidak mungkin Ah Chong meletakkan barangnya tanpa meminta kebenaran tertuduh terlebih dahulu. Malah, tertuduh mempunyai 'kuasa pelupusan' ke atas dadah yang dipersoal dan mempunyai 'kuasa untuk mengecualikan orang lain daripada menikmati' dadah tersebut. Oleh itu, dakwaan bahawa dadah tersebut adalah milik Ah Chong tidak dapat dipertahankan (lihat perenggan 48 & 50).

(7) Pihak pendakwaan telah berjaya membuktikan kesnya melampaui keraguan munasabah terhadap tertuduh. Tertuduh telah gagal menimbulkan keraguan munasabah dalam kes pendakwaan dan telah gagal untuk menyangkal anggapan pengedaran yang dinyatakan dalam s 37(da) Akta tersebut berkenaan imbangan kebarangkalian. Tertuduh didapati bersalah dan disabitkan berdasarkan pertuduhan pilihan. Sehubungan itu, tertuduh telah dijatuhkan hukuman mati, iaitu digantung di leher sehingga beliau mati, menurut s 277 Kanun Tatacara Jenayah (lihat perenggan 61).]

Cases referred to

Abdullah bin Atan v PP and other appeals [2020] 6 MLJ 727, FC (folld)
Alcontara Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Azizan bin Yahaya v PP [2013] 1 MLJ 180, CA (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85; [2005] 1 AMR 321, FC (refd)
Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)

A *Gunalan Ramachandran & Ors v PP* [2004] 4 MLJ 489; [2004] 4 CLJ 551; [2004] 6 AMR 189, CA (folld)
Henry Chan Kok Loon v PP [2017] 1 LNS 1174; [2017] MLJU 1191, CA (folld)
Husin bin Sitorus v PP [2012] 3 MLJ 782, HC (refd)
B *Khairuddin bin Hassan v PP* [2010] 6 MLJ 145; [2010] 7 CLJ 129, FC (refd)
Leow Nghee Lim v Reg [1956] 1 MLJ 28 (refd)
Looi Kow Chai v PP [2003] 2 MLJ 65]; [2003] 1 CLJ 734; [2003] 2 AMR 89, CA (refd)
Mat v PP [1963] 1 MLJ 263 (refd)
C *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169, SC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, HC (refd)
PP v Denish a/l Madhavan [2009] 2 MLJ 194; [2009] 2 CLJ 209; [2008] 3 MLRA 116; [2009] 2 AMR 757, FC (refd)
D *PP v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457; [2005] 6 AMR 203, FC (folld)
Rahmani Ali Mohamad v PP [2014] 6 MLJ 525, CA (refd)
Siew Yoke Keong v PP [2013] 3 MLJ 630, FC (refd)
E *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356; [1969] 2 AC 256; [1968] 2 WLR 1303, HL (refd)

Legislation referred to

Criminal Procedure Code ss 180, 180(1), (4), 182A(1), 277
F Dangerous Drugs Act 1952 ss 37(da), 39B, First Schedule, Part III
Evidence Act 1950 s 8

Mohd Isa bin Mohamed (Deputy Public Prosecutor, Attorney General's Chambers) for the plaintiff.
G *Mohd Ruzaini bin Zulkifli (Hafiz, Ruzaini & Co) for the defendant.*

Aslam Zainuddin JC:

[1] Cheok Chuan Huei ('the accused') was charged for an offence under
H s 39B of the Dangerous Drugs Act 1952 ('the Act'). The charge was marked as exh P2.

[2] The prosecution had called eight witnesses to prove their case against the accused. At the end of the prosecution case, the court upon a maximum
I evaluation of the credibility of witnesses and reliability of evidence adduced, ruled that the prosecution had successfully made out a prima facie case against the accused for the preferred charge of drug trafficking.

[3] Hence, the accused was directed to enter his defence pursuant to s 180 of

the Criminal Procedure Code.

[4] At the end of the defence case, the court found that the prosecution had successfully proven a case beyond reasonable doubt on the charge preferred against the accused. Hence, the accused was convicted and sentenced to death.

[5] The charge proffered by the prosecution against the accused is as follows:

> The charge (exh P2):
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> Bahawa kamu pada 23 Mac 2019, jam lebih kurang 6.45 petang bertempat di No 1-11-15, Kuchai Avenue, Jalan Kuchai Maju 13, off Jalan Kuchai Lama, di dalam Daerah Brickfields, di dalam Wilayah Persekutuan Kuala Lumpur telah mengedar dadah berbahaya iaitu 612.8 gram methamphetamine. Oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[6] Now, the brief facts of the present case led by the prosecution is as follows.

[7] On 23 March 2019 at about 6.40pm, acting on information received, the raiding officer, PW7 (Insp Azhanizam bin Ahmad) led a party of police personnel to the crime scene, No 1–11–15, Kuchai Avenue, Jalan Kuchai Maju 13, off Jalan Kuchai Lama, Kuala Lumpur ('the said premises').

[8] When the team reached the said premises, PW7 found the grill was locked. PW7 knocked the door a few times but nobody answered. PW7 then instructed his team to cut and break the padlock (exh P26) of the grill and subsequently, opened the main door which was unlocked. PW7 together with his team successfully entered the said premises and saw the accused was standing in front of the master bedroom. At that instance, PW7 identified himself as a police inspector and a body search was conducted on the accused but nothing incriminating was found.

[9] PW7 asked the accused 'adakah kamu menyimpan apa-apa barang salah' and subsequently, the accused brought PW7 and his team to the main room to one safe deposit box which was locked (exh P24) from the dressing cabinet. Then, the accused opened the padlock (exh P25A) using a key (exh P25B) which was placed on top of the safe deposit box and handed over to PW7 14 transparent plastic packets (exh P9(1–14)) suspected to contain illegal drugs *id est* methamphetamine having a gross weight of 860g.

[10] Further inspection was conducted by the police team in the room and they discovered:

(a) one pair of 'superior product garage men denimwear' brand blue jeans (exh P17A);

(b) one white/green/grey striped t-shirt (exh P18A);

(c) one red towel (exh P19A);

(d) one Darlie toothbrush (exh P20A);

(e) one access card (exh P27B);

(f) eight keys (exh P27C); and

(g) one fingerprint padlock (exh P26) — this was at the main entrance.

[11] Consequently, the accused was arrested and PW7 handed over the accused and the items seized to the investigating officer, PW8 (Insp Nur Ismail bin Misnan).

[12] Following that, on 28 March 2019, PW8 sent the impugned drugs (exh P9 (1–14)) to the Chemistry Department for analysis by the chemist, PW1 (Encik Rahman bin Mamat). On the same day, exhs P17A, P18A, P19A and P20A were also sent to the forensic chemist, PW2 (Encik Muhammad Fauzi bin Ahmad) by PW5 upon the instruction of PW8. The result was tendered as exh P13.

[13] PW1, the chemist confirmed upon analysis that the packets (exh P9(1–14)) contained 612.8g of methamphetamine, the subject-matter of the charge in exh P2.

THE COURT'S DUTY AT THE END OF THE PROSECUTION CASE

[14] Section 180(1) of the Criminal Procedure Code ('CPC') provides that at the conclusion of the prosecution case, the court shall consider if the prosecution has established a prima facie case against the accused. Section 180(1) of the Criminal Procedure Code states:

> 180 Procedure after conclusion of case for prosecution
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> (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.
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> (2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.
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> (3) If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.
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> (4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[15] In *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85; [2005] 1 AMR 321, the Federal Court held that as an accused can be convicted on prima facie evidence, it must reach a standard which is capable of supporting a conviction. The Federal Court stated:

> [21] Section 180(1) makes it clear that the standard of proof on the prosecution at the close of its case is to make out a prima facie case while s 182A(1) enunciates that at the conclusion of the trial the court shall consider all the evidence adduced and decide whether the prosecution has proved its case beyond reasonable doubt. The standard of proof on the prosecution at the end of its case and at the end of the whole case has thus been statutorily spelt out in clear terms. The submission made must therefore be ratiocinated against the background of the meaning of the phrase 'prima facie case' in s 180. Section 180(2) provides that the court shall record an order of acquittal if a prima facie case has not been made out while s 180(3) provides that if a prima facie case has been made out the accused shall be called upon to enter his defence. A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase 'prima facie case' is defined in similar terms in *Mozley and Whiteley's Law Dictionary* (11th Ed) as:
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> > A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.
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> [22] The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a prima facie case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. As the trial is without a jury it is only with such a positive evaluation can the court make a determination for the purpose of s 180(2) and (3). Of course in a jury trial where the evaluation is hypothetical the question to be asked would be whether on the evidence as it stands the accused could (and not must) lawfully be convicted. That is so because a determination on facts is a matter for ultimate decision by the jury at the end of the trial. Since the court, in ruling that a prima facie case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus, if the accused elects to remain silent he must be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie case.
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> [23] As the accused can be convicted on the prima facie evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable

doubt. However, it must be observed that it cannot, at that stage, be properly described as a case that has been proved beyond reasonable doubt. Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by s 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence. However, where the accused remains silent there will be no necessity to re-evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such a consideration. The prima facie evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt.

[16] The Court of Appeal in *Looi Kow Chai v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734; [2003] 2 AMR 89 held that:

> In our respectful view, the correct test to be applied in determining whether a prima facie case has been made out under s 180 of the CPC (and this would apply to a trial under s 173 of the CPC) is that as encapsulated in the judgment of Hashim Yeop Sani FJ (as he then was) in *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 at p 270: 'To summarize, it would therefore appear that having regard to the prosecution evidence adduced so far, a prima facie case has not been established against Nordin Johan and Aziz Abdullah, the second accused and the fourth accused which, failing their rebuttal, would warrant their conviction. In other words if they elect to remain silent now (which I hold they are perfectly entitled to do even though they are being tried under the Emergency Regulations) the question is can they be convicted of the offence of section 302 read with section 34 of the Penal Code? My answer to the question is in the negative.' We are confident in the view we have just expressed because we find nothing in the amended s 180(1) of the CPC that has taken away the right of an accused person to remain silent at the close of the prosecution case. Further we find nothing in the legislative intention of Parliament as expressed in the language employed by it to show that there should be a dual exercise by a judge under s 180 when an accused elects to remain silent as happened in *Pavone v Public Prosecutor* [1984] 1 MLJ 77. In other words, we are unable to discover anything in the language of the recently formulated s 180 that requires a judge sitting alone first to make a minimum evaluation and then when the accused elects to remain silent to make a maximum evaluation in deciding whether to convict or not at the close of the prosecution case.
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> It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the CPC has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal.

[17] The steps that should be taken by the court at the close of the prosecution case has also been set out in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457; [2005] 6 AMR 203 and *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1.

FINDING OF THE COURT AT THE END OF THE PROSECUTION CASE

[18] In order for the prosecution to make out a prima facie case on the trafficking charge against the accused, it is necessary for the prosecution to prove the following three elements of the offence under s 39B of the Act. They are firstly, the drugs involved must be a dangerous drug as specified in the First Schedule of the Dangerous Drugs Act 1952. Secondly, the drugs were in the possession of the accused and thirdly, the accused was trafficking the said drugs.

DRUGS INVOLVED MUST BE A DANGEROUS DRUG AS SPECIFIED IN THE FIRST SCHEDULE TO THE ACT

[19] In respect of the identity and weight of the impugned drugs, PW1, in his sworn evidence which was corroborated by his chemist report (exh P7) confirmed that the impugned drugs contained 612.8g of methamphetamine. It is also stated in the Act that methamphetamine is a dangerous drug listed in Part III of the First Schedule to the said Act.

[20] In the circumstances, I find that PW1 is a qualified person who has recognised and reliable specialist knowledge, skills or experience and with adequate expertise to analyse the said drugs. Furthermore, I also find that PW1 has undertaken a methodical analysis to determine its identity and weight in accordance with the rules and procedure issued by the Chemistry Department.

[21] I find that, from the evidence of the prosecution witnesses, there were no discrepancies and serious doubt as to the weight and markings of the impugned drugs as alleged by the defence. It was verily stated by PW1 in his sworn evidence that the gross weight of the impugned drugs were 815g using the calibrated weighing machine. I find that the chain of custody in handling the impugned drugs were intact from the day PW7 seized the drugs, and also when the drugs were analysed by the chemist as it was the same drugs that was recovered in this instant case until its production before this court.

[22] Hence, relying on the landmark case of *Gunalan Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; [2004] 4 CLJ 551; [2004] 6 AMR 189, I find that the first element of the offence has been proven by the prosecution on a maximum evaluation. Abdul Hamid Mohamed JCA (as he then was) said:

[41] First, by way of a general observation, I am of the view that, in a drug trafficking case what is important is that it must be proved that it is the substance that was recovered that was sent to the chemist for analysis and it is that same substance that is found to be heroin or cannabis etc and it is in respect of that substance that an accused is charged with trafficking. So, the chain of evidence is more important for the period from the time of recovery until the completion of the analysis by the chemist. Even then it does not necessarily mean that if the exhibit is passed from one person to another, every one of them must be called to give evidence of the handing over from one person to another and if there is a break, even for one day, the case falls. There should be no confusion between what has to be proved and the method of proving it. What has to be proved is that it is the substance that was recovered that was analysed by the chemist and found to be heroin, cannabis etc, and it is for the trafficking of that same substance that the accused is charged with.

[42] The proof of the chain of evidence is only a method of proving that fact. The fact that there is 'a gap', does not necessarily mean that that fact is not proved. It depends on the facts and circumstances of each case. There may be a gap in the chain of evidence. But, if for example, during that 'gap' the exhibits are sealed, numbered with identification numbers, there is no evidence of tempering, there is nothing that would give rise to a doubt that that exhibit is the exhibit that was recovered in that case and that was analysed by the chemist, the fact that there is a gap, in the circumstances of the case, may not give rise to any doubt of that fact.

[43] The second period is from the time that it was received back from the chemist until it is produced in court. In my view, the chain of evidence is less important during this second period. This is because, as far as I am aware, there is no law that the exhibit recovered must be produced in court and if not the prosecution's case must necessarily fall. It may or it may not, again depending on the facts and the circumstances of each case. Even in a murder trial, the dead body is not produced in court. In *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195 (FC) the body of the victim was not even recovered, yet the accused was convicted of murder. What the prosecution has to prove is that a particular person had died and the accused had caused his death. The death of the victim is not proved by looking at his remains in court, but by evidence of witnesses, the medical report, the identity card, the photographs and so on. Similarly, in a drug trafficking case, the drug may be lost or destroyed subsequent to it having been analysed by the chemist, there may be a gap in the chain of the people keeping custody of it subsequent to it having been analysed by the chemist until the date of trial, but so long as there is no doubt that the drug analysed by the chemist was the same one that was recovered in the case and it is in respect of that drug that the accused is charged, and there is a reasonable explanation as to how it was lost or destroyed or the reason for the gap, there is no reason why the prosecution's case should fall.

WHETHER THE PROSECUTION HAS SUCCESSFULLY PROVEN THE ELEMENT OF POSSESSION

[23] At the end of the prosecution case, it was submitted that the accused had possession of the said drugs. It was argued by the prosecution that there were six factors relevant for this court to take into consideration which are:

(a) the accused had possession of the impugned drugs found in the said premises. PW4 in his testimony confirmed that the accused was the tenant of the said premises and that the tenancy agreement (exh P22) was signed by the accused himself. PW4 also mentioned that the last time he went to the premises, the accused was living alone;

(b) PW7 gave evidence that the accused was alone at the time the raid was conducted. The impugned drugs (exh P9(1–14)) was found in the room led by the accused himself, and consequently, he was arrested by the police party;

(c) DNA evidence of the accused was found in exhs P17A, P18A and P19A, which confirmed the accused was the resident of the said premises;

(d) PW8 testified that the accused rented the said premises and no other person had access to the fingerprint padlock (exh P26) as demonstrated before this court;

(e) the accused had exclusive access over the said premises and consequently had possession of the impugned drugs; and

(f) the accused had knowledge on the basis that he led the police party to the said drugs pursuant to s 8 of the Evidence Act 1956 considering the subsequent conduct of the accused in handing over the impugned drugs to PW7 at the time of the raid.

[24] The prosecution relied on s 37(da) of the Act and quoted the case of *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337. Hence, the weight of the drugs as mentioned in the preferred charge raised an inference of trafficking since it was highly improbable that such an amount of drugs was for personal purposes or consumption. Since the accused was found in possession of the drugs, the presumption of trafficking under s 37(da) of the Act should be invoked against him by the court.

[25] Next, it was submitted by the learned defence counsel, that from the prosecution evidence, the accused did not fulfil any of the elements essential to prove the ingredient of possession both the physical element of custody or control let alone the mental element of knowledge. The main contention of the defence was that there were other individuals who had access to the said premises other than the accused himself. When the police party raided the

premises, at the first instance, the accused made known to PW7 that the drugs found belonged to one Ah Chong and were not his. Counsel relied on the case of *Azizan bin Yahaya v Public Prosecutor* [2013] 1 MLJ 180 to support his contention.

[26] The defence also contended PW8 should have submitted the accused person's phone for further analysis to verify the veracity of the defence version and also to determine whether the impugned drugs indeed belonged to one Ah Chong. In this context, PW8 failed to do so. It was also submitted that inadequate investigation by PW8 on this aspect was fatal to the prosecution case as alluded in the case of *Rahmani Ali Mohamad v Public Prosecutor* [2014] 6 MLJ 525.

[27] Furthermore, the photos of the crime scene (exh P32(1–16)) revealed that the room which the said drugs were found was not locked and hence it was asserted by the defence that the said house was accessible by anyone apart from the accused and that there was no evidence, direct or circumstantial, to prove that the accused was in custody or control of the drugs found (refer to the case of *Husin bin Sitorus v Public Prosecutor* [2012] 3 MLJ 782).

[28] At this juncture, the defence contended the prosecution failed to present before this court sufficient evidence to prove that the accused was involved in trafficking the said drugs.

[29] Now, as to the second element of the offence, *id est* possession, this term has been defined by Thomson J in *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237 as follows:

> 'Possession' itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Ed p 304):
>
> > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
>
> To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shewn that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some *animus possidendi*. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and

accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shews such an intention. Or it must be clear that the circumstances in which it is found shew such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there must be something in the evidence to satisfy the Court that the person who is physically in a position to deal with the thing as his own had the intention of doing so. It is true that in prosecutions under the Dangerous Drugs Ordinance a lack of evidence in this connection may be made good by the statutory presumptions contained in that Ordinance. But there are no such presumptions in the Common Gaming Houses Ordinance nor are there any such presumptions in relation to possession of stolen property. Once possession is proved then before the accused person can be convicted it is necessary in addition to prove *mens rea*. And for this purpose as was pointed out by Gordon-Smith Ag CJ in the case of *Toh Ah Lam and Mak Thim v Rex* (1949) MLJ 54, it is necessary to prove that the person in possession knows the nature of the thing possessed.

If the thing, as in *Toh's* case, is in a box which itself is in the possession of the accused it must be proved that he knew what was in the box. If, as in *Lee's* case, it was a lottery document it must be proved that he knew it was a lottery document. Here again knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite. There may be something in the accused's behaviour that shews knowledge, or the nature of the thing may be so obvious that it is possible to say 'he must have known what it was' or, again in cases under the Dangerous Drugs Ordinance, there may be a statutory presumption which fills a gap in the evidence.

[30] The above contention is supported by the case of *Leow Nghee Lim v Reg* [1956] 1 MLJ 28, whereby Taylor J explained the phrase custody, control and possession as follows:

The word 'possession' is one of the most difficult of English words. It is derived from *posse* to be able and *sedere* to sit or occupy. The fundamental concept is power of occupation; primarily this referred to land and later the meaning was extended to power of user of a chattel. The primary lay meaning of possess is to hold as property, to own. The primary legal meaning of possess is to have possession, as distinct from ownership. This is well illustrated by the popular phrase for a sheriff's agent, 'A man in possession,' who really has only custody. Shakespeare more accurately called him a bum bailiff. In this Ordinance custody is distinguished, and I think 'possession' means possession irrespective of whether the possessor is the beneficial owner. Probably the most helpful definition of possession is:

The relation of a person to a thing over which he may at his pleasure exercise such

control as the character of the thing admits, to the exclusion of other persons.

This definition does not express, but it does imply that the meaning of the word includes some element of knowledge.

A man must know of the existence of a chattel and have some idea of its whereabouts before he can exercise any control over it. The word possession therefore implies some knowledge but not necessarily full or exact knowledge. The patriarch Benjamin, *Genesis 44,* was clearly in possession of his sack of corn but he was not, in truth, in possession of the silver cup which had been 'planted' in it, entirely without his knowledge. The prisoner *Sleep* (1861) 8 Cox CC 472; Le & Ca 44 had a mixed lot of copper bolts, some of which bore the Queen's mark. He knew he had copper bolts and therefore he was in possession of the whole lot. The question was whether he knew that some of them were so marked. How much a man knows about things in, or apparently in, his possession is a matter of fact, to be inferred from all the circumstances.

In some of the cases it has been said that without knowledge there can be no possession. In others, 'in possession' has been read as 'knowingly in possession' by application of the doctrine of mens rea. In some instances either view leads to the same result but not in all. The dicta do not make clear what degree of knowledge is meant. Also, in some of the statutes, 'possession' and 'knowledge' have been treated separately and much confusion has resulted.

The word 'possession' is a vague and general word which cannot be closely defined. Without at least general knowledge there cannot be possession but there can be possession without full and exact knowledge. This is recognised in the present Drugs Ordinance which provides, by the presumption already cited, that if a man has custody or control of a drug the onus of proving, first that he did not have possession, and secondly that he did not know the nature of the drug, shall be shifted to him. The Ordinance deals both with opium and with other drugs. Possession of opium is prohibited absolutely. Possession of drugs in general is not prohibited absolutely because many drugs are familiar household articles; it is only dangerous drugs which are prohibited. The special presumption as to knowing the nature will therefore seldom apply to opium; it will more frequently apply to other drugs. A man might know that he had a white powder, and therefore be in possession of a drug, but he might not know whether it was bicarbonate, a common household drug, or heroin, a dangerous drug of similar appearance. Such a case would resemble that of *Sleep* (1861) 8 Cox CC 472; Le & Ca 44. The distinction is not applicable in the present case but is mentioned here because counsel argued that the word 'possession' is used in different senses in the Ordinance. I do not think that is so. I think the word possession is used consistently in the Ordinance in its ordinary, but imprecise, sense.

It has also been said that intention to exercise the power of disposal is a necessary element of possession. This cannot be supported as part of a general definition. A woman is undoubtedly in possession of her wedding ring but as a rule she does not intend to dispose of it; many are buried wearing it. But she can pawn it, in case of need. Similarly with guilty possession. In general a thief intends to dispose of his loot but the rich collector who filched a rare stamp and the crazy artist who took the Mona Lisa, in order to gloat over them in private, were equally thieves. Intention is

a separate matter.

The dictionary definition brings in the idea of exclusiveness. It is often said that 'possession must be exclusive.' This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property.

Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions.

[31] It is the duty of the court to make sure that there was credible evidence to prove each ingredient of the offence charged. Evidence was presented before this court that the accused himself dealt with respect to matters relating to the said premises vide the tenancy agreement (exh P22). This was confirmed by the evidence of PW4, the landlord that exh P22 was signed by the accused. That being the case, it can be inferred that the accused had possession of the said premises as a tenant. Now, according to PW7's sworn evidence, at the time of the raid, PW7 and his team knocked the door a few times but no one answered. The police team was forced to cut the padlock of the grill in order to enter the premises. Upon entering, PW7 saw the accused was standing in the living room alone and there were no other individuals present at that material time. The impugned drugs (exh P9(1–14)) were found in the room led by the accused and the safe deposit box (exh P24) was opened by the accused using a key, placed on top of the safe deposit box. Suffice to say, this fact proved that the accused indeed had access to the room and therefore had possession over the impugned drugs.

[32] The main contention of the learned defence counsel was that the premises were accessible to other persons as testified by PW7. Nevertheless, I am not inclined to agree with that argument. I refer to exh P38 (1–3) which is the photos of the fingerprint padlock (exh P26). I notice that the fingerprint padlock can be unlocked with a specific thumbprint *id est* that of the accused who was the occupant of the said premises. The photos in exh P32 (3–6) also appeared to be the same fingerprint padlock. Consequently, PW8 also conducted a demonstration before the court that showed only the fingerprint of the accused can open the padlock. That being the case, I find that, indeed the house can be accessible to other persons but of course with the permission of the accused. Therefore, I agree with the submissions of the prosecution that based on the evidence, it can be inferred that the accused had exclusive access

over the said house and consequently had possession of the impugned drugs.

[33] Furthermore, it was established by the prosecution that the forensic evidence adduced before this court which was confiscated by the police party confirmed there were DNA of the accused at the premises. Conclusive DNA evidence was found specifically in exhs P17A, P18A and P19A showing a positive match. On that account, I find the accused certainly was the occupant of the said premises. There were no other persons staying or occupying the said premises as testified by PW4. The issue of access by other individuals or persons is ruled out as the accused was the only individual occupying the premises. Accordingly, I find the prosecution has successfully proven that the accused had possession of the impugned drugs.

[34] Next, the issue of knowledge necessary to establish possession came to be considered by the English House of Lords in the case of *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356; [1969] 2 AC 256; [1968] 2 WLR 1303, where Lord Wilberforce had this to say:

> In all such cases, the starting point will be that the accused had physical control of something — a package, a bottle, a container — found to contain the substance. This is evidence — generally strong evidence — of possession. It calls for an explanation: the explanation will be heard and the jury must decide whether there is genuine ignorance of the presence of the substance, or such an acceptance of the package with all that it might contain, or with such opportunity to ascertain what it did contain or such guilty knowledge with regard to it as to make up the statutory possession. Of course it would not be right, or consistent with the terms of the Act, to say that the onus of showing innocent custody rests upon the accused. The prosecution must prove the offence, and establish its ingredients. But one starts from the point that the Act itself has exempted the great majority of cases of innocent possession so that once the prosecution has proved the fact of physical control in circumstances not covered by an exemption and something of the circumstances in which this was acquired or held, this, in the absence of explanation, may be sufficient to enable a finding of possession to be made. On the other hand, the duty to submit the question of possession to the jury in this way does give the opportunity of acquittal to innocent carriers and custodians, who can put forward an explanation of the physical fact which a jury accepts.

[35] It is incumbent upon me to scrutinise the entire evidence before the court to see whether an inference can be drawn against the accused person that he knew about the impugned drugs which were discovered in the said premises especially the evidence asserted by the prosecution at the close of its case, particularly the accused person's conduct during the search wherein the impugned drugs (exh P9 (1–14)) were found in the safe deposit box in the= room led by the accused himself.

[36] On that account, having thoroughly gone through the evidence of the witnesses particularly the testimony of the raiding officer, PW7 who arrested the accused, I am satisfied that an inference can be drawn that the accused had knowledge of the impugned drugs which were found in the said premises at the time the raid was conducted by the police party.

[37] At this juncture, I invoked the statutory presumption in s 37(da) of the Act. The amount of drugs involved is well in excess of 50g, thus triggering the statutory presumption of trafficking as provided in s 37(da) of the Act (see the case of *Khairuddin bin Hassan v Public Prosecutor* [2010] 6 MLJ 145; [2010] 7 CLJ 129 and the case of *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337).

INCOMPLETE INVESTIGATION BY PW8

[38] It was argued by learned counsel that there had been a complete failure on the part of PW8 to investigate thereby depriving the accused the right to a fair trial. The defence submitted that PW8 failed to investigate the defence version that the impugned drugs belonged to one Ah Chong. It was also put by the defence that the DNA report (exh P13) specifically in para 6.4 which stated 'satu profil DNA bercampur telah diperolehi daripada kesan DNA surih pada berus gigi '4' yang terdiri daripada sekurang-kurangnya tiga individu dan tidak dapat ditentukan secara konklusif' and therefore there were other individuals who actually occupied the said premises.

[39] Contrary to this, I find that the version suggested by the defence is rather inherently improbable on the basis that at the time of the raid PW7 confirmed when he testified before this court that the accused was alone. I also find that the issue of access to the said house is not relevant as it was confirmed by PW4 that the last person who dealt with matters relating to the said house was the accused himself. This fact proves that no other person had access to the said house (see *Leow Nghee Lim v Reg*, *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630 and *Chan Pean Leon v Public Prosecutor*). Apart from that, the forensic evidence collected came out positively *id est* the DNA was that of the accused. The accused failed to provide detailed particulars of one Ah Chong for PW8 to further investigate on that particular matter. Ergo, I am inclined to disagree with the submissions of the defence and find that PW8 had done a thorough and complete investigation in this case.

[40] Furthermore, I am in full agreement with the prosecution's submission that the absence of forensic evidence like finger prints of the accused was irrelevant and should not be questioned in the instant case where the impugned drugs were found bearing in mind that the accused was the occupant of the said house, and that being so he had possession and knowledge (see *Leow Nghee Lim*

v Reg, Siew Yoke Keong v Public Prosecutor [2013] 3 MLJ 630 and *Chan Pean Leon v Public Prosecutor*).

[41] Having said so, for the above reasons, I have considered all the evidence adduced by the prosecution, and subjected them to a maximum evaluation as laid down in the landmark case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* and I am satisfied that the prosecution had adduced credible evidence to successfully prove a prima facie case against the accused for the preferred charge against him. Again, I quote the Federal Court case of *Balachandran v Public Prosecutor* as follows:

> a 'prima facie case' is therefore one that is sufficient for the accused to be called upon the answer. This in turn means that the evidence must be such that it can be overthrown only by evidence in rebuttal…In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine the elements of the offence have been established.

[42] Pursuant to s 180 of the Criminal Procedure Code, the accused was therefore called upon to enter his defence on the preferred charge. The accused elected to give evidence on oath.

THE DEFENCE

[43] Now, briefly, the accused's defence is as follows:

(a) on the fateful day, the accused reached home after he bought some food. At the material time, the accused was in the kitchen when he heard someone break the front door of the said premises;

(b) subsequently, the accused saw a group of men enter his house and one of them introduced himself as a policeman. The said policeman asked him 'di manakah barang yang disimpan Ah Chong?';

(c) then, the accused mentioned that Ah Chong was his friend. Ah Chong and his three other friends stayed there a few days before the police raided his house;

(d) on many occasions, Ah Chong will come to his house. One day when Ah Chong came, he brought a silver safe deposit box and told the accused not to open it;

(e) when the police party raided the house, the accused led them to the room wherein Ah Chong kept the safe deposit box. The said box was locked and the accused never opened it;

(f) the accused mentioned to the police regarding Ah Chong and his friends and handed over his handphone to the investigating officer;

(g) the investigating officer also showed the accused the CCTV recordings and that there were multiple individuals who entered the said house; and

(h) the accused denied having knowledge of the impugned drugs found in the said house.

Analysis of the defence

[44] The defence contends that there were other occupants in the said premises, or at the very least there were others who would have access to the said premises on the day of the incident and these contentions were supported by the accused's sworn evidence (exh WSSD1). Hence, the defence says that the prosecution had failed to prove beyond a reasonable doubt the preferred charge against the accused (refer to the case of *Azizan bin Yahaya v Public Prosecutor* [2013] 1 MLJ 180).

[45] The defence also submitted that PW8 failed to investigate the defence version that the impugned drugs belonged to one Ah Chong and this omission has led to a serious gap in the prosecution case. Furthermore, the accused never had any means or power of disposal of the safe deposit box containing the impugned drugs and thus the accused did not have possession of the said drugs. The accused also strongly denied having any knowledge of the impugned drugs. For these reasons, the prosecution has failed to prove its case against the accused beyond a reasonable doubt and prays this court make an order of acquittal and discharge in his favour in respect of the charge preferred against him.

[46] The prosecution on the other hand, submitted that the defence put forward by the accused was a bare denial and an afterthought. At the time of the raid, the accused was alone in the said premises and the fact that the accused himself led the police to the impugned drugs proved that the accused had possession of the said drugs. This fact was not disputed at the prosecution stage. The fact that the premises was accessible by other individuals was an afterthought defence as it was never brought up at the prosecution stage. It was also submitted, the defence never cross examined or put any questions to the prosecution witnesses on this issue. Furthermore, the prosecution's version was credible and that the impugned drugs were found inside the said premises rented by the accused. Hence, the defence raised by the accused was a bare denial and should rightly be rejected by this court.

[47] Now, at the close of the defence, the court then embarked upon an evaluation of the evidence on record as a whole, so as to give consideration to the entirety of the evidence in the context of both the prosecution and defence case.

[48] Having perused the defence laid down by the accused, I find that it was an afterthought and constitutes a bare denial. I reject the version illustrated by the accused that the impugned drugs were not his and that it belonged to Ah Chong instead. It was illogical for Ah Chong to keep the drugs in the accused person's house. As mentioned by the accused in his evidence, Ah Chong came to his house once in a while with his three other friends. The house was rented by the accused vide exh P22, the tenancy agreement, hence it was not probable for Ah Chong to put his things without first asking permission from the accused. Further, the accused said Ah Chong also instructed him not to open the safe deposit box which was placed in his house. I find that a bit peculiar. Indeed, the accused has the 'power of disposal' over the impugned drugs and has the 'power to exclude other persons from enjoyment' of the said drugs.

[49] I am inclined not to give credence to the defence as alluded by the accused that the premises were accessible by other persons. DNA evidence tendered showed the DNA of the accused was present and considerably he was the occupant of the said house. The CCTV recordings also showed that the accused was the last person who entered the said house.

[50] Having said so, I fully accept the evidence of PW7, the raiding officer that the accused was alone at the material time. The allegation that the said drugs was Ah Chong's was unsustainable and I find that the accused failed to provide the details of Ah Chong to PW8 and therefore it was unfair on PW8 for him to investigate further on information which was not provided to him (see *Alcontara Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 (FC)).

[51] I refer to the oft quoted case of *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237 on the meaning of possession in criminal law. I reiterate my findings in paras 29–37 on the issue of possession.

[52] In the Federal Court case of *Public Prosecutor v Denish a/l Madhavan* [2009] 2 MLJ 194; [2009] 2 CLJ 209; [2008] 3 MLRA 116; [2009] 2 AMR 757 (FC), Abdul Aziz Mohamad FCJ (as he then was) had this to say about exclusive possession:

> [17] The idea of exclusivity features in the meaning of 'possession' in criminal law as one of the elements necessary to constitute possession. As Taylor J said in *Leow Nghee Lim v Reg* [1956] MLJ 28:
>
> > ... It is often said that 'possession must be exclusive'. This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor or possessors have the power to exclude other persons from enjoyment of the property.

Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions'.

[53] Now, the relevant portion of s 37(da) of the Act is reproduced below:

37 Presumptions

In all proceedings under this Act or any regulation made thereunder —

(da) any person who is found in possession of —

...

(xvi) 50 grammes or more in weight of Methamphetamine;

...

otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

[54] That being so, I find the accused had failed to rebut the presumption under s 37(da) of the Act on a balance of probabilities.

[55] I rely on the case of *Abdullah bin Atan v Public Prosecutor and other appeals* [2020] 6 MLJ 727, where the Federal Court deliberated on the issue of s 37(da) of the Act as follows:

[43] Section 180(4) of the CPC must be read in light of its context and legislative purpose. By so doing, the phrase 'credible evidence proving each ingredient of the offence' in s 180(4) means that the prosecution may prove each ingredient of the offence either:

(a) by adducing credible direct evidence of that ingredient;

(b) by drawing inferences of fact, ie adducing credible circumstantial evidence, from which the ingredient can be inferred; or

(c) by invoking presumptions of law, ie adducing credible evidence of the relevant basic facts, to invoke a statutory presumption that the ingredient exists.

[44] As to what constitutes 'a prima facie' case, the judgment of Vincent Ng J (as he then was) in *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678; [1998] 4 CLJ 209 is instructive. Although Ong Cheng Heong was decided prior to the amendment in 2006, we respectfully endorse His Lordship's views, at p 691 (MLJ); p 225 (CLJ): What then constitutes a 'prima facie case'? 'Prima facie' means on the face of it or at first glance. ... perhaps the most appropriate definition of 'a prima facie case' could be found in the Oxford Companion of Law (p 987), which has it as: 'A case which is sufficient for an answer. While prima facie evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary,

but is not conclusive'. It would follow that there should be credible evidence on each and every ingredient of the offence. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. Any evidence which is not safe to be acted upon, should be rejected. (Emphasis added.)

At p 691 (MLJ); p 224 (CLJ), His Lordship said:

> ... to me, maximum evaluation simply means evaluation, on a prima facie basis, of each and every essential ingredient of the charge as tested in cross-examination. In other words, maximum evaluation connotes quantitative rather than qualitative evaluation of the evidence; with focus more on the evidential burden in terms of evidence led, rather than the persuasive burden in terms of qualitative degree of proof.

[45] The only basis of learned counsel's contention that the presumption in s 37(da) cannot be invoked to establish a prima facie case under s 180 of the CPC, is that presumption is not evidence. Hence, it was argued that in relying on such presumption, it cannot be said that the prosecution has 'adduced credible evidence proving each ingredient of the offence' under s 180(4) of the CPC. The argument is premised purely on semantics.

[46] Indeed, a presumption is not evidence; rather, it is a rule of evidence stating how a particular fact can be proved, as supported by the following authorities:

> A presumption has no probative value and is not evidence, being nothing more than a rule of law which assists a party in making out a prima facie case' (see Michigan Law Review, 'Presumptions as Evidence in Criminal Cases' at 504);
>
> Presumptions are a special mode of proving facts which must otherwise be proved by evidence. Where there is direct evidence to prove the presumed facts, the presumptions do not need to be applied (see *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649 at 668).

[47] Presumptions of fact and law operate in every legal system. The use of presumptions has always been standard judicial practice. This court has endorsed the use of the presumption in s 37(da) of the DDA by the prosecution to establish a prima facie case of drug trafficking. What is required of the prosecution is to adduce credible evidence of the basic facts (ie the nature and amount of the drug and, possession), in order to rely on the presumption of trafficking in s 37(da).

[48] In *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273, the issue was whether at the close of the prosecution's case, the court, in a trafficking case, could make a finding of 'custody and control' to presume possession and then on that presumption, further presume trafficking. This court held that the use of presumption over presumption was unduly harsh and oppressive. Nevertheless, it was unanimously recognised that the presumption of trafficking may be invoked only once a finding of actual possession is made. Chong Siew Fai CJSS said the following at pp 288–289, 292:

> The wordings in sub-ss (d) and (da) of s 37 are clear and unequivocal. That being so, their meanings must be determined from the language employed and the two subsections must be taken to mean exactly what they respectively say. ...
>
> In our view, there is clear undeniable distinction between the word 'deemed'

used in s 37(d) and the word 'found' employed in s 37(da) of the Act. The 'deemed' state of affairs in s 37(d) (ie deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs, ie the finding of custody and control. Such presumptions as under s 37(d) (and for that matter, the one under s 37(da)) are sometimes described as 'compelling presumptions' in that upon proof of certain facts by a party (in our present case, proof of custody or control in s 37(d) by the prosecution), the court must in law draw a presumption in its favour (ie presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make. On the other hand, the word 'found' in the opening phrase of s 37(da) connotes a finding after a trial by the court.

...

In our view, to constitute 'possession' under s 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence.

...

We would further add that in so construing as we do, we see no injustice to the prosecution. In a proper case where the evidence so warrants and the amount of the dangerous drug reaches or exceeds the quantity specified in s 37(da), there is nothing to prevent a trial court from coming to a factual finding of possession as understood in criminal law, thereby attracting the presumption of trafficking under the said s 37(da) which, of course, is rebuttable.

[49] Applying the above passage in Muhammed bin Hassan, 'based on evidence' therefore refers to the finding of possession and not the finding of trafficking (see also *Public Prosecutor v Tan Tatt Eek & other appeals* [2005] 2 MLJ 685).

[56] Reliance is placed also on the Court of Appeal case of *Henry Chan Kok Loon v Public Prosecutor* [2017] MLJU 1191; [2017] 1 LNS 1174, where it was held by Zabariah Mohd Yusof JCA (as she then was) as follows:

[57] Section 37(d) of the DDA, already provided a 'deemed state of affairs' (ie deemed possession and deemed knowledge). There is no longer the necessity for the prosecution to prove how these possession or knowledge were derived at. So long as there is already a finding of custody and control, the presumption is triggered. Since the learned Judge had already made a finding of custody and control of P66 and its contents, the Accused is deemed to have possession and knowledge. This has been illuminated by Chong Siew Fai CJ (Sabah and Sarawak) in *Muhammed Hassan v Public Prosecutor* [1998] 2 MLJ at p 273, delivering the judgment of the Federal Court:

'The 'deemed state of affairs in s 37(d) (ie deemed possession and deemed knowledge) is by operation of law and there is no necessities to prove how the

particular state of affairs is arrived at. There need only be established the basic or primary facts necessary to give rise to that state of affairs ie the finding of custody or control. Such presumptions as under s 37(d) (and, for that matter, the one under s 37(da) are sometimes described as 'compelling presumptions' in that upon proof of custody or control in s 37 presumption in its favour (ie presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make.

[57] For the foregoing reasons, I rejected the defence put forward by the accused that the impugned drugs were not in his possession. The evidence presented by the prosecution against the accused was overwhelming. I find PW1, PW2, PW4, PW7 and PW8's testimonies were credible, direct and trustworthy and that the prosecution had successfully proven a case beyond reasonable doubt against the accused. The accused had failed to raise a reasonable doubt in the prosecution's case.

FINDINGS OF THE COURT AT THE CLOSE OF THE DEFENCE CASE

[58] It is my duty at the close of the defence case as set out in s 182A(1) of the Criminal Procedure Code which states:

Procedure at the conclusion of the trial

(1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

(2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.

(3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

[59] In the Federal Court case of *Balachandran v Public Prosecutor*, Augustine Paul JCA (as he then was) stated as follows:

[23] As the accused can be convicted on the prima facie evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. However, it must be observed that it cannot, at that stage, be properly described as a case that has been proved beyond reasonable doubt. Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by s 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence. However, where the accused

remains silent there will be no necessity to re-evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such a consideration. The prima facie evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt.

[60] I am further mindful of the oft quoted case of *Mat v Public Prosecutor* [1963] MLJ 263 that was affirmed by the Supreme Court in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 where Suffian J (later Lord President) held as follows:

If you accept the explanation given by or on behalf of the accused, you must of course acquit. But this does not entitle you to convict if you do not believe that explanation, for he is still entitled to an acquittal if it raises in your mind a reasonable doubt as to his guilt, as the onus of proving his guilt lies throughout on the prosecution. If upon the whole evidence you are left in a real state of doubt, the prosecution has failed to satisfy the onus of proof which lies upon it.

The position may be conveniently stated as follows:

(a) If you are satisfied beyond reasonable doubt as to the accused's guilt	Convict.
(b) If you accept or believe the accused's explanation	Acquit.
(c) If you do not accept or believe the accused's explanation	Do not convict but consider the next steps below.
(d) If you do not accept or believe the accused's explanation and that explanation does not raise in your mind a reasonable doubt as to his guilt	Convict.
(e) If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt	Acquit.

[61] In the totality of the evidence, I find that the prosecution has successfully proved its case beyond reasonable doubt against the accused. For the aforesaid reasons, I find the accused has failed to raise a reasonable doubt in the prosecution's case and has failed to rebut the presumption of trafficking stated in s 37(da) of the Act on a balance of probabilities. I find the accused guilty as per the charge preferred against him and I convict him. Accordingly, I order the accused to be sentenced to death, id est to be hanged by the neck till he is dead, as per s 277 of the Criminal Procedure Code.

[62] *Ergo cadit quaestio.*

Accused convicted and sentenced to death.

Reported by K Selvaraju